FOR ARGUMENT

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

JAYNE BRAY, *et al.*,
Petitioners,
v.
ALEXANDRIA WOMEN'S HEALTH CLINIC, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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SUPPLEMENTAL BRIEF FOR PETITIONERS ON REARGUMENT

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I. THIS COURT'S OPINION IN *PLANNED PARENTHOOD v. CASEY* DOES NOT SUPPORT RESPONDENTS' PROPOSITION THAT OPPOSITION TO ABORTION IS EQUIVALENT TO DISCRIMINATION AGAINST WOMEN.

Respondents' effort to satisfy the "class-based, invidiously discriminatory animus" requirement of § 1985(3), *Griffin v. Breckenridge*, 403 U.S. 88, 102 (1971), hinges on establishing that opposition to abortion is equivalent to discrimination against women. Contrary to respondents' contention, Rearg. Br. 2-4, this Court's decision in *Planned Parenthood of Southeastern Pennsylvania v. Casey*, 112 S. Ct. 2791 (1992), lends no support to such a proposition. To the contrary, throughout the entire course of its abortion jurisprudence—from *Roe v. Wade*,

410 U.S. 113 (1973), through *Casey*—this Court has never grounded the abortion right on equal protection analysis, which would be the natural approach if restrictions on abortion did indeed constitute discrimination against women.[1]

The joint opinion for the Court in *Casey* grounded the abortion right on substantive due process—not equal protection. 112 S. Ct. at 2804-08. The constitutional analysis adopted in the joint opinion, *id.* at 2819-21, does not proceed along familiar equal protection lines. It would be curious indeed if, so soon after a comprehensive review of the issue, in which the Court relied in large part on the value of stare decisis, it were suddenly discovered that the abortion right is, as respondents would have it, grounded in equal protection, so that opposition to abortion constitutes discrimination against women. Such a conclusion would call into question the very method of analysis embraced by the joint opinion in *Casey*, and cast doubt on a wide range of federal statutes that single out abortion for special treatment. *See* Br. of U.S. as Amicus Curiae 1. In fact, the joint opinion in *Casey* confirmed inaptness of an equal protection approach to abortion by reaffirming that "[a]bortion is a unique act," implicating liberty interests "in a sense unique to the human condition and so unique to the law." 112 S. Ct. at 2807. *Accord Harris v. McRae*, 448 U.S. 297, 325 (1980) ("Abortion is inherently different from other medical procedures"). *Cf. Maher v. Roe*, 432 U.S. 464, 470-71 (1977) (denial of funding for abortion "involves no discrimination against a suspect class. An indigent woman desiring an abortion does not come within the limited category of disadvantaged classes so recognized by our cases"); *Harris*, 448 U.S. at 322-23 (same).

Although respondents contended last year that this case "is precisely the situation for which the statute was

[1] This has not been due to oversight. One Justice viewed the manner in equal protection terms in *Casey*. *See* 112 S. Ct. at 2846-47 (opinion of Blackmun, J.).

written," Tr. of Oral Arg. 26, respondents now acknowledge that this is "[u]nlike the usual § 1985(3) case . . . ." Rearg. Br. 3. It is unlike the usual Section 1985(3) case because it "involves a right that is uniquely available to the members of the victim group." Rearg. Br. 3-4. That being so, it is logically impossible for petitioners to act with respect to that right with the "purpose of depriving [the group] of the *equal* protection of the laws, or of *equal* privileges and immunities under the laws." 42 U.S.C. § 1985(3) (emphasis added). If only the victim group can exercise the right, interfering with the right cannot deny the group equal protection or equal privileges and immunities compared to any other group. Such interference may be a deprivation of the group's rights, but it cannot be a deprivation of the group's *equal* rights.[2]

Petitioners' opposition to the "unique act" of abortion cannot be regarded as an effort to deny equal treatment to any group. Petitioners do not deny women what they permit to others; they are in no sense discriminating in their opposition to abortion. Perhaps petitioners' conduct would have violated the version of § 1985(3) originally introduced, which covered "any act in violation of the rights, privileges, or immunities of another," *see Griffin*, 403 U.S. at 101, but petitioners' conduct surely did not violate the version of the Act that became law, which was amended to focus on the denial of *equal* treatment, *id.* at 101-02.

Respondents err in relying on *International Union v. Johnson Controls, Inc.*, 111 S. Ct. 1196 (1991), to support their argument. *See* Rearg. Br. 4. As the Court made clear in *Johnson Controls*, the policy in question

[2] To embrace respondents' theory of gender discrimination, it would be necessary to conclude that if *men* could get pregnant and obtain abortions, petitioners would *not* try to stop them from aborting. There is no warrant whatsoever, in the record of this case, for such an absurd conclusion.

was discriminatory because it involved the *facially* unequal treatment of men and women. 111 S. Ct. at 1202-03. *See* Pet. Reply Br. 8-9. No such unequal treatment was shown in this case.

II. 42 U.S.C. § 1985(3) DOES NOT PROVIDE AN INJUNCTIVE REMEDY.

As respondents stated in the first sentence of their complaint, "[t]his is an action for declaratory and injunctive relief . . . ." J.A. 6. *See also ibid.* ("Plaintiffs . . . seek a limited injunction"). At no point in their complaint or elsewhere did respondents seek damages.[3] Because 42 U.S.C. § 1985(3) does not authorize injunctive relief, the decision below should be reversed.[4]

First, Section 1985(3) by its plain language authorizes only "an action for the recovery of damages," 42 U.S.C. § 1985(3). It does not mention injunctive relief. "A frequently stated principle of statutory construction is that when legislation expressly provides a particular remedy or remedies, courts should not expand the coverage of the statute to subsume other remedies." *National R.R. Passenger Corp. v National Ass'n of R.R. Passengers*, 414 U.S. 453, 458 (1974); *accord Jett v. Dallas Indep. School Dist.*, 109 S. Ct. 2702, 2720 (1989). On that basis, for example, this Court has held that a statute expressly authorizing private citizens to sue for injunctions would not be construed as implying a private right of damages. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 14-15 (1981). "In the absence of strong indicia of a contrary congressional intent, we are compelled to conclude that Congress provided precisely the remedies it considered appropriate." *Id.* at 15.

[3] The district court erroneously stated, in a passing footnote without citation, that respondents "also seek damages." Pet. App. 36a n.14. The court went on to note, however, that "plaintiffs offered no evidence as to the existence or amount of damage suffered." *Ibid.* The court of appeals recognized that respondents' suit was for injunctive relief, *see* Pet. App. 5a-6a, as respondents themselves have throughout this litigation, *see, e.g.*, Resp. Br. 4. Had respondents in fact sought damages, petitioners would have been entitled to a jury trial under the Seventh Amendment.

[4] *See* Br. for the U.S. as Amicus Curiae 7-8 n.8. The question whether the statute authorizes the type of relief plaintiffs seek is both "antecedent" to the question whether the statute covers petitioners' conduct and "ultimately dispositive of the present dispute." *Arcadia, Ohio v. Ohio Power Co.*, 111 S. Ct. 415, 418 (1990). Accordingly, this Court may consider that threshold question even though it was not raised or decided below. *Ibid.* (adopting construction of statute not argued by parties or considered by lower courts). This is different from respondents' "prevent or hinder" claim, which respondents attempted to raise in their supplemental brief on reargument, because that claim seeks to introduce a different and independent basis for relief into the case at this late stage.

Second, Section 1985(3) was enacted as Section 2 of the Ku Klux Klan Act of 1871, and Congress demonstrated in Section 1 of the same Act that it knew how to provide for equitable relief when it wanted to do so. Section 1—enacted at the same time as Section 2—is codified as 42 U.S.C. § 1983. It provides expressly for "an action at law, *suit in equity*, or other proper proceedings for redress." 42 U.S.C. § 1983 (emphasis added). In contrast, in Section 2, Congress limited the available relief to "an action for the recovery of damages." 42 U.S.C. § 1985(3). "Where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States*, 464 U.S. 16, 23 (1983) (internal quotation marks and citations omitted). *See also Gozlon-Peretz v. United States*, 111 S. Ct. 840, 847 (1991); *General Motors Corp. v. United States*, 110 S. Ct. 2528, 2534 (1990).

Third, "Section 1985(3) provides no substantive rights itself; it merely provides *a remedy* for violation of the rights it designates." *Great Am. Fed. Sav. and Loan*

Ass'n v. Novotny, 442 U.S. 366, 372 (1979) (emphasis added). *See also United Bhd. of Carpenters & Joiners v. Scott*, 463 U.S. 825, 833 (1983). Because the *only* congressional purpose for the passage of § 1985 was to specify "a remedy" for the violation of rights which already existed under the Constitution, it would be absurd to suggest that Congress might have intended to create other remedies which it simply forgot to mention. For that same reason, there is no basis for *implying* any additional, unexpressed remedies under Section 1985(3) to vindicate *rights conferred under that statute*, because the *statute confers no rights*. This case is therefore unlike *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229 (1969), where the Court implied a remedy under 42 U.S.C. § 1982 when that statute conferred a substantive right without an explicit remedy.

Taken together, § 1983 and § 1985—originally § 1 and § 2 of the same Act—reflect a congressional determination that *any* conspirator who violates constitutional rights (with, respectively, the requisite state action or animus) should be answerable in *damages*. On the other hand, Congress authorized the drastic remedy of an *injunction* to prevent such deprivations *only* in the extraordinary case where the offenders act with the assistance of local authorities, who therefore cannot be trusted to remedy such deprivation themselves. By refusing to furnish a federal injunctive remedy except where the defendants acted in conspiracy with State officials, Congress implicitly signaled its recognition that purely private conspiracies to violate constitutional rights are best handled by State and local governments, which traditionally have played the primary role in the maintenance of public order. Seen in this light, the differing remedies furnished by Congress in § 1983 and § 1985 reflect the same concerns for federalism that were later identified by this Court as the basis for abstention in *Younger v. Harris*, 402 U.S. 37 (1971).

Accordingly, because § 1985(3): (1) is a purely remedial statute, (2) explicitly mentions a remedy other

than equitable relief, (3) does not provide for injunctive relief, and (4) immediately follows a companion section that provides for injunctions under certain narrower circumstances, well-settled principles of statutory construction compel the conclusion that injunctive relief is not available under § 1985(3). *Accord Cuban v. Kapoor Bros., Inc.*, 653 F. Supp. 1025, 1033 (E.D.N.Y. 1986) (injunctive relief "is unavailable under section 1985; the statutory remedy is limited to the recovery of damages") (citation omitted); *Mullarkey v. Borglum*, 323 F. Supp. 1218, 1228 (S.D.N.Y. 1979) ("While plaintiffs have made out a claim under § 1985(3), however, they are not entitled to a preliminary injunction. The statutory remedy provided . . . is set forth at the end of § 1985(3), and is limited to 'the recovery of damages' ").

Respondents essentially concede that § 1985(3) does not itself authorize injunctive relief, and argue instead that 28 U.S.C. § 1343(a)(4) authorizes such relief. Rearg. Br. 9. That argument is clearly mistaken. Section 1343 (a)(4) is a general jurisdictional provision. It provides district court jurisdiction over actions "[t]o recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights." If the specific Act of Congress relied upon does not itself authorize injunctive relief, however, this jurisdictional provision cannot expand the relief available. *Cf. Touche Ross & Co. v. Redington*, 442 U.S. 560, 576-577 (1979) (rejecting the argument that a jurisdictional provision in a statute can give rise to cause of action: "[t]he source of plaintiff's rights must be found . . . in the substantive provisions . . . , not in the jurisdictional provision").

Indeed, 28 U.S.C. § 1343 as a whole confirms what the text of 42 U.S.C. § 1985(3) plainly provides—that the only available remedy is for damages. When Congress specifically mentioned Section 1985 in the text of 28 U.S.C. § 1343, it expressly limited the grant of jurisdiction to jurisdiction "[t]o recover damages." *See* 28 U.S.C.

§ 1343(a)(1) (jurisdiction "[t]o recover damages [due to] any act done in furtherance of any conspiracy mentioned in § 1985 of Title 42"); 28 U.S.C. § 1343(a)(2) (jurisdiction "[t]o recover damages from any person who fails to prevent or to aid in preventing any wrongs mentioned in § 1985 of Title 42"). Since Section 1985 only authorizes an action to recover damages, this jurisdictional limitation where Section 1985 is explicitly mentioned makes perfect sense. The provisions of § 1343 that are *not* limited to jurisdiction "[t]o recover damages," by contrast, do not specify 42 U.S.C. § 1985. Instead, these provisions apply more generally to actions under "the Constitution of the United States or . . . any Act of Congress providing for equal rights of citizens," 28 U.S.C. § 1343(a)(3), or to "any Act of Congress providing for the protection of civil rights," 28 U.S.C. § 1343(a)(4). There are, of course, provisions within these broad categories that—unlike Section 1985—do authorize injunctive relief, which explains the broader jurisdictional grant than in the provisions that specifically mention Section 1985.

The legislative history of 28 U.S.C. § 1343(a)(4) further confirms that 42 U.S.C. § 1985(3)—in providing "an action for the recovery of damages"—means what it says. The only report on the bill that added § 1343(a)(4) expressly noted that § 1985(3) "establishes liability *for damages*." H.R. Rep. No. 291, 85th Cong., 1st Sess. 10 (1957) (emphasis added). Indeed, the Report referred to Section 1985 generally as "provid[ing] a civil remedy *in damages* to a person damaged as a result of conspiracies to deprive one of certain civil rights." *Id.* (emphasis added). Section 1343(a)(4) accompanied a proposal to give the Attorney General (*not* private parties) authority to seek injunctive relief under Section 1985(3), H.R. Rep. No. 291, *supra*, at 10-11; Section 1343(a)(4) was proposed only as a "technical amendment[]" to existing law to give district courts jurisdiction to entertain the Attorney General's requests. H.R.

Rep. No. 291, *supra*, at 11. Yet even that limited authority to seek injunctive relief was not enacted, although § 1343(a)(4) was. *See Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 610 (1979). In sum, the legislative history of 28 U.S.C. § 1343(a)(4) confirms that district courts lack authority under 42 U.S.C. § 1985(3) to award injunctive relief.

Finally, respondents' belated reliance on "general powers of equitable relief under the All Writs Act, 28 U.S.C. § 1651," Rearg. Br. 9, is plainly a make-weight. As this Court explained, "[w]here a statute specifically addresses the particular issue at hand, it is that authority, and not the All Writs Act, that is controlling." *Pennsylvania Bureau of Correction v. United States Marshals Serv.*, 474 U.S. 34, 43 (1985). Here § 1985(3) specifically addresses the question of what relief it provides: "an action for the recovery of damages." 42 U.S.C. § 1985(3). The general provisions of the All Writs Act cannot be used to override the specific limitations in § 1985(3) itself.[5]

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[5] The only case respondents cite on this point is *Brewer v. Hoxie School Dist. No. 46*, 238 F.2d 91 (8th Cir. 1956). The court in that case expressly found that an injunction was proper on other grounds apart from § 1985(3), and recognized that § 1985(3) "does not expressly accord . . . a right to injunctive relief . . . . The specific grant is of a right of action for recovery of damages occasioned by acts done in furtherance of [a] conspiracy." 238 F.2d at 103. Having already found a basis for injunctive relief on other grounds, the court went on to find that § 1985(3) affords "additional support to the federal jurisdiction and the issuance of the injunction." 238 F.2d at 104.

CONCLUSION

This Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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